No. 83-1894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Are employees unlawfully restrained in the exercise of their federal statutory right to refrain from concerted activity by an internal union rule, enforceable by court-collectible fines, which prohibits them from resigning from union membership during a strike or lockout or when one appears imminent?

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This amicus curiae brief for the National Right to Work Legal Defense Foundation ("Foundation") is filed with the written consent of all parties. Sup. Ct. R. 36.2. It supports the position of respondents that the decision of the court of appeals, enforcing an order of the National Labor Relations Board, should be affirmed.

INTEREST OF THE AMICUS CURIAE

The Foundation is a charitable, legal aid organization formed to protect the right to work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from becoming or remaining formal union members subject to discipline—the statutory right at stake in this case.

The Foundation is providing legal assistance to individual employees in more than twenty cases in which a union relies upon a restriction upon resignations to justify punishment of the employees for returning to work during a strike. Two of those cases are now before the Court on petitions for certiorari from a decision directly contrary to that of the court of appeals in this case. *NLRB v. Machinists Local 1327*, 725 F.2d 1212 (9th Cir. 1984), *petitions for cert. filed*, 53 U.S.L.W. 3291, 3301 (U.S. Sept. 27, Oct. 1, 1984) (Nos. 84-494, 84-528). The individual employees fined for returning to work during the strike are not parties to this case. Therefore, the Foundation submits this brief to ensure that the Court will have the views of those persons whose freedom of association and economic livelihood are directly and adversely affected by union rules restricting resignations.

STATEMENT OF THE CASE

This case is before the Court to review a decision of the United States Court of Appeals for the Seventh Circuit

enforcing an order of the National Labor Relations Board ("Board"). The Board and court of appeals found that the Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations (collectively "the union") violated section 8(b)(1)(A) of the National Labor Relations Act ("the Act" or "the NLRA"), 29 U.S.C. § 158(b)(1)(A) (1982), by imposing court-collectible fines on ten employees as punishment for resigning from the union and returning to work during a strike. A provision of the union's constitution which prohibits members from resigning during a strike or lockout, or when a strike or lockout appears imminent, was held to be unenforceable under the Act.

The material facts are stated in the decisions of the Board and its Administrative Law Judge. Appendix to Petition for Cert. ("App.") at 10a-11a, 14a-16a, 27a-32a. Two important facts are not mentioned in the union's statement of the case. First, the collective-bargaining agreements between the union and the employers, both before and after the strike, contained compulsory-unionism clauses which required union membership as a condition of employment. *Id.* at 11a, 14a & n.8, 16a n.13. Second, the union insisted that employees Nelson and Kohl become full members, not just pay dues, in order to comply with this requirement. *Id.* at 15a-16a & nn.12-13, 29a.

SUMMARY OF ARGUMENT

The most fundamental purpose of the NLRA, 29 U.S.C. §§ 151-69 (1982), is to protect the freedom of individual employees to associate or not to associate in labor

unions. The courts, including this Court in a trio of earlier decisions, have uniformly held that the right to refrain from union membership guaranteed by § 7 of the Act includes the right of a member to resign.

Moreover, although the Court did not decide the precise issue in those earlier decisions, the principles established by those cases, and the rules of statutory construction, mandate the conclusion that a proviso to § 8(b)(1)(A) protecting the right of unions to prescribe membership criteria must be construed to disallow any union rule prohibiting resignations. The enforcement of such a rule through court-collectible fines is unlawful restraint and coercion, because the rule (1) impairs the fundamental congressional policy of employee freedom of association and (2) is one which employees cannot escape by leaving the union.

This conclusion is supported by the legislative history of the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), which added the statutory provisions involved here to the NLRA. That history shows not that Congress intended to preserve a common-law power of unions to restrict the right of members to withdraw, but rather that Congress meant to guarantee employees a right to resign and return to work during a strike.

That union membership under the NLRA is not voluntary in the common-law sense further indicates that union rules restricting resignations are unenforceable under the Act. In this case, the labor contract required union membership as a condition of employment; and the union did not give employees the option of paying dues without

becoming formal members. Moreover, in the general case, the status of a union as exclusive representative itself coerces membership. Thus, the union constitution is a contract of adhesion which it is unconscionable to enforce against an employee who, out of economic necessity, resigns to return to work during a strike.

ARGUMENT

I. A Union Rule Prohibiting Resignations Frustrates the Act's Overriding Policy of Protecting Employee Freedom of Association

"It is indisputable that the thrust of the NLRA is not the protection of the union, not the protection of the employer, but rather the protection of the employee." *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 442 (5th Cir. 1978). The Act does not foster union membership *per se*, but guarantees employees the right to self-determination as to union membership.

The congressional declaration of policy in section 1 of the Act establishes the protection of employee freedom of association as a fundamental purpose of the statute:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association*, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating

> the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (emphasis added). Congress emphasized the specific importance of employee freedom of choice vis-a-vis labor unions in section 1(b) of the Labor Management Relations (Taft-Hartley) Act, 1947, amending the NLRA, which declares that it is "the purpose and policy" of the Act, "in order * * * to protect *the rights of individual employees in their relations with labor organizations* whose activities affect commerce, to define and proscribe practices on the part *of labor* and management which affect commerce and are inimical to the general welfare." 29 U.S.C. § 141(b) (emphasis added).[1]

Indeed, this Court has viewed protection of employee freedom of association as *the* overriding purpose of the Act. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), the Court said that the two declared policies of the Act, to preserve a competitive business economy and to protect the rights of labor to organize, "depend for their foundation upon assurance of 'full freedom of association.' *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining 'the normal flow of commerce and . . . the full production of articles and commodities . . . .'"

Section 7 implements the Act's basic purpose by guaranteeing individual employees "the right to refrain from

[1] Section 1(b) of Taft-Hartley is important here because the "right to refrain" language of 29 U.S.C. § 157, and the whole of 29 U.S.C. § 158(b)(1)(A), were added to the NLRA by Taft-Hartley. Pub. L. No. 80-101, sec. 101, 61 Stat. 136, 140-41 (1947). The NLRA is a subchapter of the Taft-Hartley Act, 29 U.S.C. §§ 141-87 (1982).

any or all" union and other concerted activities, "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8](a)(3)." 29 U.S.C. § 157 (emphasis added). But a compulsory-unionism agreement authorized by § 8(a)(3) can require only "financial core" membership—the payment of dues and fees—not *full* union membership subject to union rules and discipline. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742-43 (1963); *see* 29 U.S.C. § 158(a)(3), (b)(2). Thus, the right to refrain includes the right of an employee to refuse in the first instance to become a full, formal member of a union. *NLRB v. Gold Standard Enterprises, Inc.*, 679 F.2d 673, 677 (7th Cir. 1982); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1085-87 (9th Cir. 1975).

The union concedes this, but argues that § 7 does not protect the right to *resign* union membership, once acquired. Brief for Petitioners ("Pet.") at 33. This argument is untenable, however, in the face of *Machinists Booster Lodge 405 v. NLRB*, 412 U.S. 84 (1973) (per curiam), and *NLRB v. Textile Workers Local 1029 (Granite State)*, 409 U.S. 213 (1972), which held that a union commits an unfair labor practice where it fines employees who lawfully resign from membership before returning to work for a struck employer.

Booster Lodge described *Granite State* as "concluding that the members were free to resign at will and that § 7 of the Act protected *that right* to return to work during a strike which had been commenced while they were union members." 412 U.S. at 87-88 (emphasis added)

(citation & footnote omitted); *see Granite State*, 409 U.S. at 216. And in both cases, Justice Blackmun specifically referred to the "§ 7 right to resign from the union and to return to work without sanction." *Booster Lodge*, 412 U.S. at 91 (Blackmun, J., concurring); *Granite State*, 409 U.S. at 222 (Blackmun, J., dissenting).

As the Board has long held, "the withdrawal by employees from a union [is] an act not qualitatively different from the refusal by employes [*sic*] *to join* a union." *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 560 (1955). It follows that the right to refrain encompasses the right, once having joined, to resign from full membership, as the conflicting court of appeals' decisions in this case and in *Machinists Local 1327* recognized. App. at 5a; *Machinists Local 1327*, 725 F.2d at 1217.

Because § 7 does *not* say that the right to refrain exists except as limited by union rules, the union seizes upon § 8(b)(1). The latter section makes it an unfair labor practice for a labor organization "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] of this [Act]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • • ." 29 U.S.C. § 158(b)(1)(A). The fallacy in the union's position, though, is that the § 8(b)(1)(A) proviso must be construed so as not to deny § 7 rights of individual employees.

"Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms,

since they are intended to restrain or except that which would otherwise be within the scope of the general language." *Detroit Edison Co. v. SEC*, 119 F.2d 730, 739 (6th Cir.), *cert. denied*, 314 U.S. 618 (1941). This principle has been applied to other NLRA provisos which trench on the right of employees to choose between union membership and non-membership. *See, e.g., NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 694-95 (1942); *NLRB v. Radio Officers' Union*, 196 F.2d 960, 964 (2d Cir. 1952), *aff'd*, 347 U.S. 17 (1954). Consistency of statutory interpretation requires its application here.

On its face, the proviso to § 8(b)(1)(A) merely privileges a union to set the terms on which an individual may acquire and retain full membership, but grants *no* power to prevent an employee from refusing to join or from leaving the union. *Marlin Rockwell*, 114 N.L.R.B. at 561-62. The common understanding of the phrase "rules with respect to the acquisition or retention of membership" supports this construction. For example, in *Machinists v. Gonzales*, 356 U.S. 617, 620 (1958), this Court described a controversy as to the legality of an employee's *expulsion* from membership as "precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.'" Similarly, *Price v. NLRB*, 373 F.2d 443, 447 (9th Cir. 1967) (emphasis added), *cert. denied*, 392 U.S. 904 (1968), held "that, at the least, the proviso was intended to permit the union to *suspend* or *expel* a member who [attacks the union's position as bargaining agent]." And, *NLRB v. Machinists District Lodge 99*, 489 F.2d 769, 772 (1st Cir. 1974) (emphasis added), said

that "the proviso of § 8(b)(1)(A) preserves a union's most basic power: that of *granting* or *withholding* membership."

The privilege to grant or withhold membership to or from an employee who wishes to be a member does not include the power to *require continuation* of membership by an unwilling employee. The contrary interpretation would allow the proviso to eviscerate the more fundamental policy to which it is only a limited exception. And that would contravene the test this Court has established for determining the lawfulness of attempts to enforce union rules: "§ 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has imbedded in the labor laws*, and is reasonably enforced against union members *who are free to leave the union and escape the rule*." *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (emphasis added).[2]

[2] This Court relied on the *Scofield* test in *Granite State*, 409 U.S. at 216, and the court of appeals found it dispositive here, App. at 4a-5a, 8a. Even *Machinists Local 1327*, 725 F.2d at 1216, recognized that this test should be used in determining the lawfulness of a union prohibition on resignations, although the Ninth Circuit misstated and misapplied it. Nonetheless, the union argues that *Scofield* formulated the test only for "union rules that address the substance of what union members may do," and, therefore, it "does not apply to a rule that does no more than state * * * at what times an individual may resign membership." Brief for Pet. at 34 n.13 (emphasis omitted). The suggestion that a rule prohibiting exercise of the statutory right to resign during strike periods is merely procedural is disingenuous, to say the least! *See* App. at 8a. Moreover, the *Scofield* test clearly applied to procedural rules, as it was derived in part from *NLRB v. Marine Workers*, 391 U.S. 418 (1968). In that case the Court held that a union could not enforce a rule "requiring a member to exhaust union remedies before filing an unfair labor practice charge." *Scofield*, 394 U.S. at 429-30. An exhaustion requirement, or course, *is* a procedural rule.

A union constitutional provision prohibiting resignation, either absolutely or (as here) at certain times, fails the *Scofield* test in two respects. First, it impairs the fundamental congressional policy of protecting the full freedom of association of individual employees with regard to formal union membership, as the Seventh Circuit held. App. at 6a-7a. "Although the unions in *Granite State* and *Booster Lodge* did not restrict resignations, the Court's reasoning applies equally here." *Id.* at 5a. Regardless of whether what an employee orginally "endorsed" was membership or a strike, "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." *Granite State*, 409 U.S. at 217-18.

Second, a provision prohibiting resignation from membership does not leave the employee "free to leave the union and escape the rule," as required by *Scofield*, 394 U.S. at 430. The union, like the Ninth Circuit in *Machinists Local 1327*, conveniently overlooks this phrase. Brief for Pet. at 34 n.12; *see Machinists Local 1327*, 725 F.2d at 1216. However, as the court of appeals held in this case, the "escape the rule" language is not mere surplusage, but a separate, fundamental element of the test which must be met if a union rule is to be enforceable. App. at 8a.[3] Indeed, in applying its test in *Scofield*, the

[3] The Seventh Circuit is not alone in applying *Scofield* in this way. *See Helton v. NLRB*, 656 F.2d 883, 893-96 (D.C. Cir. 1981); *NLRB v. Oil Workers Local 6-578*, 619 F.2d 708, 712-13 (8th Cir. 1980); *National Cash Register Co. v. NLRB*, 466 F.2d 945, 958-59 (6th Cir. 1972), *cert. denied sub nom. NCR Employees' Indep. Union v. NLRB*, 410 U.S. 966 (1973).

Court explicitly stated that a union rule establishing production ceilings for members could be enforced lawfully through fines only because, "[i]f a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, *then he may leave the union* and obtain whatever benefits in job advancement and extra pay may result from extra work * * * ." 394 U.S. at 435 (emphasis added). Self-evidently, this language applies to the situation here, where the union rule purports to deny employees any right to work at all.

Refusing to acknowledge that members must be "free to leave the union and escape the rule," the union and its amicus, Teamsters for a Democratic Union ("TDU"), rationalize restrictions on the right to resign during strike periods because they "protect the common interest of maintaining a united front during the most critical time a union faces." Brief for Pet. at 38; *accord* Brief of TDU *passim*. Thus, relying on "the presence of boilerplate provisions in a union's constitution," *Granite State*, 409 U.S. at 220 (Blackmun, J., dissenting), the unions, and the Ninth Circuit in *Machinists Local 1327*, have revived the doctrines of "mutual reliance" and "union solidarity" which this Court explicitly and categorically rejected in *Granite State*, 409 U.S. at 217-18.

In short, although this Court did not decide the precise question in *Scofield, Granite State*, and *Booster Lodge*, the Seventh Circuit correctly concluded that those decisions implicitly teach that the proviso to § 8(b)(1)(A) does not authorize the enforcement, through court-collectible fines, of a union constitutional provision

abrogating the § 7 rights of individual employees to resign from union membership and then refrain from participating in a strike.

II. The Legislative History of the Act Demonstrates That Congress Intended to Protect the Right of Employees to Resign and Work During A Strike

Perhaps realizing the force of those precedents against it, the union deals little with *Scofield, Granite State*, and *Booster Lodge* in its brief. The bulk of its argument is devoted to a convoluted, distorted, and sometimes irrelevant discussion of the legislative history of the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The union contends that that history shows that Congress intended the § 8(b)(1)(A) proviso to preserve intact a common-law power of unions, as "voluntary associations," to place contractual restrictions on the right of members to withdraw. In fact, the debates reflect no congressional belief that common-law principles would permit provisions in union constitutions to override the NLRA's explicit, fundamental statutory policy of protecting full employee freedom of association.

The bill which became Taft-Hartley was introduced in the House of Representatives as H.R. 3020. When reported from committee, H.R. 3020 included the "right to refrain" language in § 7. The Minority Report objected that this represented a change from the common law of contracts, saying that the right of employees to associate in unions

> is a natural right that exists and existed prior to

> passage and independent of the National Labor Relations Act. The bill would seriously compromise this natural right by the addition of language purporting to guarantee a specious right "to refrain from any and all such activity." The amendment to the present guaranty is unnecessary and illogical and can only lead to a serious increase in litigation and controversy. *Long-established contractual relationships* and mutually satisfactory bargaining arrangements of the vast majority of American industry *are made prey to the whims and caprice of malcontents.*

H.R. Rep. No. 245, 80th Cong., 1st Sess. 75 (1947), *reprinted in* Legis. Hist. at 292, 366 (emphasis added).[4]

Similarly, when Senator Ball proposed to amend the Senate version of the bill, S. 1126, to prohibit labor unions from coercing "employees in the exercise of the rights guaranteed in section 7," Senator Pepper argued that this was "unnecessary" because workers were already "protected by law, by the law of the land, against coercion." Senator Taft responded that the amendment was necessary because there was then "no law of any State" protecting employees who do not wish to be union members from "methods of coercion short of actual physical violence."[5] 93 Cong. Rec. 4136, 4145 (daily ed.

[4] "Legis. Hist." references are to Subcomm. on Lab. of the Sen. Comm. on Lab. & Pub. Welfare, 93d Cong., 2d Sess., *Legislative History of the Labor Management Relations Act, 1947* (1974).

[5] Senator Ball, sponsor of section 8(b)(1)(A), included "retaliatory disciplinary action by union leadership against employees" as an example of the type of union coercion the new law was designed to prevent. 93 Cong. Rec. 4549, 4559 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1199-1200. Court-collectible fines are an inherently coercive

Apr. 25, 1947), *reprinted in* Legis. Hist. at 1017-18, 1030-31. Significantly, *even after the union-rules proviso had been added* to § 8(b)(1)(A), Senator Morse opposed the new section because he believed it "would tremendously extend Federal power into areas that have heretofore been regarded as the sole concern of State, county, and local authorities." 93 Cong. Rec. 4549, 4554 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1191.

The legislative history of Taft-Hartley shows more than that Congress generally intended to guarantee employees' associational rights to an extent greater than had previous law. In *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967) (5-4 decision), this Court narrowly divided as to whether Congress meant to permit unions to fine *full members* for strikebreaking. But the congressional debates do indicate that a specific purpose of the 1947 amendments was to protect the right of employees to *resign* their union membership and return to work during a strike.

Shortly after H.R. 3020 was reported in the House, Representative Hoffman commented that the words of § 7(a) declaring that "the employee shall have the right—'to refrain from any and all such activity' * * * meant simply that a man should have the right to join or not to join, to be bound by *or not to be bound by, union*

form of economic reprisal. *Machinists Booster Lodge 405*, 185 N.L.R.B. 380, 381 (1970), *enforced in pertinent part*, 459 F.2d 1143 (D.C. Cir. 1972), *aff'd*, 412 U.S. 84 (1973). Thus, this case is clearly distinguishable from *NLRB v. Teamsters Local 639*, 362 U.S. 274 (1960), in which the conduct at issue was mere peaceful picketing, and there was no legislative history directly supporting the Board's interpretation of the phrase "restrain or coerce."

rules." 93 Cong. Rec. 3572, 3612 (daily ed. Apr. 16, 1947), *reprinted in* Legis. Hist. at 669, 733 (emphasis added). Logically, the right not to be bound by union rules is meaningless if an employee, once he joins a union, is locked into obeying its rules by a rule prohibiting resignation. Because the bill's supporters understood this, H.R. 3020 as it passed the House included a section 8(b)(1) making it an unfair labor practice for unions, "by intimidating practices, to interfere with the exercise by employees of rights guaranteed in section 7(a) or to compel or seek to compel any individual *to become or remain* a member of any labor organization." H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1) (Apr. 18, 1947), *reprinted in* Legis. Hist. at 158, 178-79 (emphasis added).

The bill passed by the Senate made it unlawful for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7," and included the union-rule proviso. H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1) (May 13, 1947), *reprinted in* Legis. Hist. at 226, 239. The House members of the conference committee agreed to the Senate language in § 8(b)(1). However, their acceptance of the omission of the redundant second clause of the House bill did not mean that the section no longer protected the right to resign from union membership, or for that matter the right to refuse to join a union in the first instance. On the contrary, the report of the House conferees explained that the Senate language for § 8(b) was acceptable because it provided *greater* protections to individual employees than did the original House bill: "From the above description of the House bill and the Senate amendment dealing with unfair labor practices on the part of labor organizations

and their agents, it is apparent that the Senate amendment was *broader* in its scope than the corresponding provisions of the House bill." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 1, 7, 42-44 (1947), *reprinted in* Legis. Hist. at 505, 511, 546-48 (emphasis added).

The House did not rely on this Conference Report alone to show that it intended the Act to protect the right of employees to resign from union membership and return to work during a strike. It insisted that, although it would accept the broader Senate language for § 8(b)(1), there must also be explicit language in § 7 guaranteeing the right to refrain from any or all union activity. Senator Taft explained what occurred in his supplementary analysis of the bill as passed:

> The reason for [inclusion of the right to refrain language] was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights gauranteed [*sic*] them in section 7, the House conferees insisted that there be express language in section 7 *which would make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who* did not wish to join or *did not care to participate in a strike or a picket line.*

93 Cong. Rec. 7000, 7001 (daily ed. June 12, 1947), *reprinted in* Legis. Hist. at 1622, 1623.[6]

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[6] Senator Taft apparently believed that the bill guaranteed the right to resign and return to work even without the "right to refrain" language. In the debate on Senator Ball's amendment to make union restraint and

Finally, the legislative history does not support the union's contention that the proviso to § 8(b)(1)(A) empowers unions to force employees to continue formal membership against their will. Rather, the debate concerning the proviso simply confirms the obvious: that § 8(b)(1)(A) allows unions to enforce internal rules establishing who may become a member and what conduct will disable one from retaining that status.

In offering the proviso as an amendment to the Ball amendment making union restraint and coercion of employees unlawful, Senator Holland said that he was proposing the proviso because "[a]pparently it is not intended by the sponsors of the [Ball] amendment to affect at least that part of the internal administration which has to do with the *admission* or the *expulsion* of members, that is with the questions of membership." 93 Cong Rec. 4387, 4398 (daily ed. Apr. 30, 1947), *reprinted in* Legis. Hist. at 1129, 1139 (emphasis added). Then, after declaring his willingness to accept the proviso, Senator Ball confirmed that there was no provision

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coercion of employees unlawful, he commented:

> Merely to require that unions be subject to the same rules that govern employers, and that they do not have the right to interfere with or coerce employees, *either their own members* or those outside their union, is such a clear matter, and seems to me so easy to determine, that I would hope we would all agree.

93 Cong. Rec. 4136, 4145 (daily ed. Apr. 25, 1947), *reprinted in* Legis. Hist. at 1017-18, 1032 (emphasis added). After the union-rule proviso had been added, Taft also said that the Ball amendment "would not outlaw anybody striking *who wanted to strike*. • • • All it would do would be to outlaw such restraint and coercion as would prevent people from going to work *if they wished to go to work*." 93 Cong. Rec. 4549, 4563 (daily ed. May 2, 1947), *reprinted in* Legis. Hist. at 1182, 1207 (emphasis added).

in the bill "which denies a labor union the right to prescribe the qualifications of its members," "to discriminate in respect to membership," to "expel [a member] from the union at any time it wishes to do so, and for any reason," to "admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept." *Id.* at 4400-01, *reprinted in* Legis. Hist. at 1141-42. *Nowhere* in the debates, however, did any member of Congress state that the proviso would give effect to a rule which prohibits individual employees from ending their formal membership in the organization.

Thus, when read in the light of the congressional declaration that the purpose of the Taft-Hartley Act is "to protect the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b), and the legislative history showing that Congress intended to protect the right of employees to resign and work during a strike, the proviso cannot be given the construction the union urges here.

III. A Union Prohibition Upon Resignation Is Unenforceable Because Union Membership Under the NLRA Is Not Wholly Voluntary

Underpinning the arguments of the union and the TDU is the assumption that, although employees may be subject to "union-security" agreements, they *voluntarily* become and remain full union members and, therefore, *voluntarily* agree to a union's constitutional restriction upon resignation. *See* Brief for Pet. at 35-38; Brief of TDU at 11-13, 16-17. This assumption is, however, at best, a fiction—and, most realistically, an untruth.

In *Allis-Chalmers*, the Court held that an apparently voluntary, full union member lawfully could be fined for working during a strike in violation of a union rule. 388 U.S. at 196-97; *see Scofield*, 394 U.S. at 428. However, the record there showed that the union-security clause on its face informed the employees that full membership was not a condition of employment; and the charging party "offered no evidence * * * that any of the fined employees enjoyed other than full union membership." *Allis-Chalmers*, 388 U.S. at 196.[7] In this case, distinguishably, the record does not contain the wording of the compulsory-unionism agreements, which the Board described as requiring "union membership." App. at 29a, 36a n.15. Moreover, the record does show that the union unlawfully required employees to become full, rather than simply "financial core," members as a condition of employment. *Id.* at 15a-16a & nn.12-13, 29a. Therefore, no assumption is warranted that the employees in this case were voluntary members.

Indeed, any assumption here should run *against* the union. In *Booster Lodge*, 412 U.S. at 88-90, the Court required the union to prove "that the employees * * * either knew of or had consented to any limitation on

[7] The rule of conduct in *Allis-Chalmers* was a prohibition on strike-breaking; the rule at issue here is a prohibition on resignations. *Allis-Chalmers* should be confined strictly to its facts, since it was a 5 to 4 decision in which the majority was provided by Justice White, who cautioned that "[t]here may well be some internal union rules which on their face are wholly invalid and unenforceable. * * * I am doubtful about the implications of some of [the] generalized statements [of the opinion written for the Court]." 388 U.S. at 198-99 (White, J., concurring); *see Granite State*, 409 U.S. at 215.

their right to resign" or on their post-resignation conduct. *Accord id.* at 91 (Blackmun, J., concurring).[8] Also, as the Board held in this case, the union has a fiduciary duty to inform employees in an unambiguous manner of their exact obligations under a union-security agreement. App. at 15a-16a & n.13; *accord NLRB v. Teamsters Local 291*, 633 F.2d 1295, 1298-99 (9th Cir. 1980); *see, e.g., Electrical Workers (IUE) Local 801 v. NLRB*, 307 F.2d 679, 683-84 (D.C. Cir.) (opinion by Burger, J.), *cert. denied*, 371 U.S. 936 (1962).

Similarly, the burden is on the union to show that employees were informed of their option of not being full members before it can claim the benefit of a restriction upon resignation. In *Retail Clerks International Association*, 226 N.L.R.B. 80, 89-90 (1976), the Board found that a union violated § 8(b)(1)(A) by fining employees who resigned and returned to work during a strike without giving the 60 days' notice required by the union's constitution. The employees had become members after being told that they were required to do so. There was no evidence that the employees were advised of the "financial core" option. The Board ruled that, "[u]nder the circumstances, it must be held that the employees joined under compulsion." The Board therefore concluded that obligations of formal membership, including the restriction upon resignation, were ineffective with regard to the employees. *See Buckley v. Television Artists (AFTRA)*, 496 F.2d 305, 312-13 n.5 (2d Cir.) (dictum), *cert. denied*, 419 U.S. 1093 (1974). This

[8] This burden is consistent with the rule that a waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

case is squarely on point with *Retail Clerks*.[9]

Moreover, under the NLRA union membership is in a very real sense coerced even where there is no union-shop agreement. Exclusive representation

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. • • • [O]nly the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.

Allis-Chalmers, 388 U.S. at 180 (footnotes omitted). An employee who wishes to have any say over the terms and conditions of his employment must join the union to participate in the selection of the bargaining team and to vote on ratification of the contract. Under these circumstances his membership hardly equates with the purely consensual relationship governed by the common law of voluntary associations.

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[9] Many union-shop clauses use only the term "member" or "membership" to describe the employees' obligations; and unions often do not inform employees that as a matter of law these terms mean less than the colloquial meaning that the average employee understandably gives to them. T. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 69-70 (Lab. Rel. & Pub. Pol'y Series No. 15, 1977); D. Heldman, J. Bennett, & M. Johnson, *Deregulating Labor Relations* 70-71 (1981); *see, e.g., Teamsters Local 302 v. Vevoda*, 587 F. Supp. 483, 484-85 (N.D. Cal. 1984).

Rather, as Chairman Van de Water and Member Hunter noted in *Machinists Local 1327*, the "'agreements' that result from union membership have accurately been termed contracts of adhesion." 263 N.L.R.B. 984, 991 n.48 (1982); *accord Teamsters Local 439*, 237 N.L.R.B. 220, 222-23 (1978); Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1054-55 (1976). A union member must take the union constitution as it is written. It is in no sense a contract entered into at arm's length by parties of equal bargaining power such that it can be assumed that both parties assented to the individual contractual provisions.

Like the terms of other contracts of adhesion, such as consumer contracts, provisions of union constitutions which are harsh or unfair to the party of lesser bargaining power, the member, should be considered unenforceable. *See* Wellington, *supra; see also Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (2-1 decision) (general doctrine of unenforceable adhesion contracts). The unconscionability of a union restriction upon the right to resign during a strike has been established already by the Court:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.

Granite State, 409 U.S. at 217. The union provision at issue here is particularly harsh, as once a strike or lockout begins the member is *perpetually* prohibited from

resigning, no matter how long the dispute drags on.[10]

A union member who is aware of both his right to resign and a simple union prohibition on strikebreaking, and then returns to work during a strike without resigning, can with some justification be assumed to have voluntarily bound himself to the prohibition, as was done in *Allis-Chalmers*. But an employer who has joined or remained a union member under the compulsion of exclusive representation, and the deception and coercion of a misleading or misrepresented union-shop clause, in fairness should be held not bound by a union constitutional provision purporting to prevent him from leaving the union to escape punishment for strikebreaking. "To hold otherwise is to resurrect the discredited doctrine of mutual reliance and liken the member, as the union [unsuccessfully] urged in *Granite State*, to a 'volunteer for military service' who 'is under strict discipline for the duration.'" Wellington, *supra* p. 23, at 1044. Such a result would contravene the Act's overriding policy of protecting employee freedom of association, a policy embodied in the statutory language, the legislative history, and the decisions of this Court.

CONCLUSION

The Board has correctly held that "a union may not lawfully restrict the right of its members to resign from membership," and that a court-collectible fine predicated

[10] The heavy burden the union's prohibition on resignation places on employees is illustrated by this case, in which the strike lasted more than seven months. None of the fined employees resigned and went back to work until the strike was in its fifth month. App. at 27a-28a.

on such a restriction violates § 8(b)(1)(A) of the Act. *Machinists Local 1414*, 270 N.L.R.B. No. 209, slip op. at 17-18 (1984) (3-1 decision). Therefore, and upon that fundamental ground, the judgment of the Seventh Circuit enforcing the Board's order in this case should be affirmed.

Respectfully submitted,

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